

1 Stephen B. Russell, P.E.
2 Bernice Marks
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FILED

2001 MAR -2 A 10:04

KEVIN E. CORNER
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U.S. BANKRUPTCY
DISTRICT OF ARIZONA

7
8 IN THE UNITED STATES BANKRUPTCY COURT
9 FOR THE DISTRICT OF ARIZONA

10 In re:

11 CHARLES THOMAS BROWN d/b/a TOM)
12 BROWN PREFERRED TRUST)
13 COMPANY,)

14 Debtor,)

15 MAUREEN GAUGHAN, Chapter 7 Trustee)

16 Plaintiff/Judgment Creditor,)

17 v.)

18 ANN AKAMINE, *et al.*,)

19 Defendants/Judgment Debtors.)
20

Proceedings Under Chapter 7

No. 97-14228 PHX GBN

Adv. 99-00746

**MOTION TO SET ASIDE DEFAULT
JUDGMENT, MOTION FOR NEW
TRIAL, AND RELIEF UNDER
FEDERAL RULES 59 AND 60 AND
BANKRUPTCY RULES 9023 and 9024**

21 Undersigned Defendants, Stephen Russell and Bernice Marks, husband and wife,
22 hereby move this Court for relief based upon the Memorandum of Points and Authorities
23 attached hereto and incorporated herein by this reference together with the affidavits of
24 undersigned filed in support.

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2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 Undersigned Defendants are two of the many victims of the Brown scheme.
4 Undersigned lent Brown funds on a periodic basis and received assurances of repayment with
5 interest. At the time of Brown's scheme collapse, the undersigned was still owed funds from
6 Brown and still had funds loaned to Brown. Bernice Marks has never received the funds
7 loaned to Brown back and is a net creditor of Brown's bankruptcy estate. Defendant Stephen
8 Russell was only involved in a single loan to Brown many years ago and received his principal
9 back, plus \$600.00. Neither Bernice Marks nor Stephen Russell should be considered
10 recipients of preference or fraudulent payments. Both Defendants are innocent, good faith
11 victims, and at all times provided the debtor with reasonably equivalent value for any
12 payments received.

13 The undersigned Defendants have been periodically copied on various pleadings
14 pertaining to this matter, but are not lawyers and are not familiar with the Bankruptcy court
15 processes. Defendants were invited by the Trustee to provide evidence on why they should not
16 be pursued in this litigation. Defendant Stephen Russell met with the Trustee's legal
17 representatives and based on that conference Defendants were under the justifiable and
18 reasonable belief that no judgment would be sought against the undersigned. In part, this
19 belief is founded upon direct communications Defendants have had with legal counsel
20 representing the Trustee as set forth in the attached affidavit of Stephen Russell. During those
21 conversations, Stephen Russell provided the Trustee with documentation establishing that
22 Defendants were net creditors of Brown and were still seeking recovery of the amounts loaned
23 to Brown. Additionally, Defendants produced documentation to the Trustee's representatives
24 establishing the severe financial hardship facing Defendants, and the futility of attempting to
25 obtain a monetary judgment against Defendants.
26

1 At the time of these communications between Defendants and Trustee's counsel,
2 Defendants were assured that there was no desire by the Trustee to further penalize Defendants
3 and that no attempt would be made to take action against these specific Defendants that would
4 result in Defendants needing to seek protection of the bankruptcy court. These conversations
5 took place in approximately August 2000. From and after that time frame, Defendants were
6 justifiably of the opinion no default judgment would be sought against these Defendants
7 despite any "form" pleadings or mass mailings to other Defendants. These Defendants relied
8 on such communications with Trustee's counsel and took no action to protect their interests in
9 the way of raising defenses to the action being pursued.
10

11 Prior to being served with a default judgment and the post-judgment interrogatories,
12 these Defendants had received no *individualized* communications, written or oral, from the
13 Trustee or the Trustee's legal representatives. Based upon the personal and individualized
14 communications these specific Defendants had with the Trustee's representative in August
15 2000, these Defendants justifiably believed that there was no need to protect themselves from
16 an adverse judgment being obtained by the Trustee. The details of the basis for these
17 Defendants' reasonable reliance on communications with the Trustee's representative and their
18 resulting belief on the lack of need to protect themselves from adverse proceedings is set forth
19 in the attached affidavits of Stephen Russell and Bernice Marks.

20 Pursuant to F.R.C.P. 59 and 60 and Bankruptcy Rules 9023 and 9024, Defendants
21 suggest relief is appropriate granting these specific Defendants protection from the default
22 judgment obtained by the Trustee, vacating such judgment, and ordering of a new trial (in
23 actuality since the original trial never took place, the order would be to allow Defendants to
24 appear and defend themselves on the merits against the Trustee's claim).

25 Rule 60 specifically provides that "mistake, inadvertence, and excusable neglect" stand
26 as viable bases upon which a judgment can be vacated. The case law is reasonably clear that

1 this rule should be “liberally construed and any doubt resolved in favor of the application to set
2 aside a judgment in order that a case may be tried upon the merits.” See, e.g., *Laguna Royalty*
3 *Co. v. Marsh*, 350 F.2d 817 (C.A. Tex. 1965); *U.S. v. Gould*, 301 F.2d 353 (C.A. Fla. 1962).
4 Perhaps one of the more recent cases stressing that the request for relief under Rule 60 be
5 given liberal construction so as to do substantial justice can be found in *M.I.F. Realty v.*
6 *Rochester Associates*, 92 F.3d 752 (8th Cir. 1996).

7 Under the facts of the present case (assuming Defendants are granted the right to present
8 facts), it will become obvious that the judgment obtained through default in this proceeding
9 was inappropriate based not only on the justifiable belief Defendants obtained from Plaintiff’s
10 representatives as to the lack of a need to hire legal counsel to defend themselves, but also
11 based upon the fact that Defendants possess defenses to the judgment in total and, more
12 specifically, can produce evidence that the amount of judgment is based upon a
13 misinterpretation, misrepresentation, or miscalculation of the true amount of funds that could
14 be considered as having been paid to these specific Defendants that could possibly be classified
15 as preference. Case law is replete with examples justifying the revocation of a judgment based
16 upon mistake or miscalculations. See, e.g., *Hammond v. T.J. Little & Co.*, 82 F.3d 1166 (1st
17 Cir. 1996); *Meridian Savings Association v. Sadler*, 759 F.Supp. 336 (N.D. Tex. 1990).

18 These specific Defendants have a justifiable basis for the defense of this action in that
19 they gave “reasonable equivalent value” for any payments they received and they accepted the
20 payments in “good faith” and at all times acted in good faith. 11 U.S.C. §548 (C). Based upon
21 the existence of reasonable equivalent value being exchanged and the existence of good faith
22 throughout the defendants’ actions, no judgment should be obtained against the defendants.

23 Additionally, *In re United Energy Corp.*, 944 F.2d 589 (9th Cir. 1991) clearly outlines
24 the basis upon which recovery in this case on the theory propounded by the Trustee is
25 inappropriate. These specific Defendants are nothing more than unwilling victims of a Ponzi
26 scheme. *In re United Energy Corp., id.*, sets forth controlling Ninth Circuit law establishing

1 that innocent victims of a Ponzi scheme are not subject to liability to debtors' estate as long as
2 the transactions entered into by the defendants exchanged reasonably equivalent value for any
3 and all payments received from Mr. Brown. *See also M&L Business Machine Co., Inc. v.*
4 *McKay*, 164 B.R. 657 (1994); *Durkin v. Shields*, WL 808651 (1997).

5 Justice requires that as victims of the very scheme the Trustee is attempting to
6 remediate, judgment not be had against victims who participated in good faith without
7 knowledge of the existence of the fraud.

8 DATED this 1 day of March, 2001.

10
11 Bernice Marks for Stephen B. Russell
12 STEPHEN B. RUSSELL
13 5937 East Aster Drive
14 Scottsdale, AZ 85254
15 Pro Per

16 Bernice Marks
17 BERNICE MARKS
18 5937 East Aster Drive
19 Scottsdale, AZ 85254
20 Pro Per

21 **ORIGINAL and ONE COPY** of the foregoing
22 filed this 1st day of March, 2001, with
23 the Clerk of the United States Bankruptcy Court

24 **COPY** of the foregoing mailed this 1st day
25 of March, 2001, to:

26 John J. Fries
T. Brent Galligan
Ryley, Carlock & Applewhite
101 North 1st Avenue, Suite 2700
Phoenix, AZ 85003-1973
Attorneys for Chapter 7 Trustee, Maureen Gaughan

B. Gaughan